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June 1, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: Federal-State Joint Board on Universal Service; CC Docket No. 96-45

Dear Ms. Salas:

I am writing on behalf of Western Wireless Corporation ("Western Wireless") to inform you that the attached memorandum was circulated by counsel for Western Wireless today to: (1) Dorothy Atwood and Kathryn Brown of Chairman Kennard's office; (2) Jordan Goldstein, Legal Advisor to Commissioner Ness; (3) Sarah Whitesell, legal advisor to Commissioner Tristani; (4) Kyle Dixon, Legal Advisor to Commissioner Powell; (5) Rebecca Beynon, Legal Advisor to Commissioner Furchgott-Roth; (6) Chris Wright, General Counsel, and Debra Weiner, Jane Halprin, and Andrea Kearney of his staff; (7) Larry Strickling, Carol Mattey, Jack Zinman, Irene Flannery, Katherine Schroder, Lisa Boehley, Richard Smith, and Gene Fullano of the Common Carrier Bureau; and (8) David Furth of the Wireless Telecommunications Bureau.

Respectfully submitted,

Rónnie London
Counsel for the Competitive Universal Service Coalition

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MEMORANDUM

June 1, 2000

TO: Federal Communications Commission

FROM: Western Wireless Corporation

RE: Jurisdiction Over Universal Telecommunications Service Provided on Reservations by Non-Indians

This memorandum demonstrates that, under Section 214(e)(6) of the Communications Act of 1934, as amended, 1/ the Federal Communications Commission, rather than state commissions, has jurisdiction over non-Indian carriers providing telecommunications services on an Indian reservation to both Indians and non-Indians. 2/ As discussed in detail below, the provision by a non-Indian carrier of universal service targeted to residents of a reservation is subject to tribal jurisdiction rather than state commission jurisdiction under many factual circumstances. 3/ In those circumstances, the state would lack jurisdiction, and therefore the FCC would possess jurisdiction under Section 214(e)(6), to designate the carrier as an eligible telecommunications carrier ("ETC").

1/ 47 U.S.C. § 214(e)(6) ("In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the [Federal Communications] Commission shall upon request designate such a common carrier that meets the requirements of paragraph [214(e)(1)] as an eligible telecommunications carrier for a service area designated by the [Federal Communications] Commission consistent with applicable Federal and State law.").

2/ As discussed *infra*, it is clear that Indians or Indian-owned entities providing telecommunications service on reservations should be regulated by tribal authorities pursuant to the tribe's jurisdiction over interactions between its members.

3/ Note that this memo largely does not rely on cases addressing taxation, riparian rights, or the regulation of alcohol, gaming, tobacco, or hunting and fishing, because the Indian law on those topics is unique and does not provide much guidance in the context of telecommunications or other services provided by regulated utilities.

The question of whether state or tribal jurisdiction applies to an activity on an Indian reservation is a very fact- and context-specific inquiry. For example, in *White Mountain Apache Tribe v. Bracker*, 4/ the Supreme Court held:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable[.] More difficult questions arise where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute notions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake[.] 5/

Furthermore, subsequent cases have observed that old treaties between tribes and the federal government are not helpful sources of law regarding modern regulated conveniences, such as telecommunications and electric service, which did not exist at the time the treaties were signed. 6/ Thus, the determination of whether the provision of universal telecommunications service on a reservation by non-Indians under Section 214(e)(6) falls within state or tribal jurisdiction may turn largely on the "particularized inquiry" into the relevant state, federal and tribal interests and the nature and breadth of the offering proposed by the carrier. 7/

4/ 448 U.S. 136 (1980).

5/ 448 U.S. at 144-45.

6/ *See, e.g., Devil's Lake Sioux Indian Tribe v. North Dakota PSC*, 896 F.Supp. 955, 960 (D. ND 1995) ("Any attempt to predicate Tribal authority to regulate the distribution of electrical energy on the Reservation on the 1867 treaty requires creativity beyond rationality. * * * * The authority to regulate the distribution of electrical services cannot be predicated upon a treaty.").

7/ *Cf. Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).

The seminal case on the jurisdiction of Indian tribes to regulate the activities or transactions of non-Indians on reservations is *Montana v. United States.* 8/ In that case, the Supreme Court construed the "inherent sovereign power" of tribes to regulate the activities of non-Indians on reservations:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on [non-fee] lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the **political integrity, economic security, or health or welfare of the tribe.** 9/

The paradigm established by this holding is as follows: Where an Indian provides goods or services on the reservation to a member of the tribe, the tribe has jurisdiction. Where an Indian provides goods or services on the reservation to a non-Indian, the tribe usually has jurisdiction. 10/ Where a non-Indian provides goods or services on the reservation to the tribe or its members, the tribe often may regulate the transaction under the "consensual relationship" prong of *Montana v. United States.* And, where a non-Indian provides goods or services on the reservation to a non-Indian, the tribe has jurisdiction only if the transaction significantly affects the political integrity, the economic security, or the health or welfare of the tribe.

8/ 450 U.S. 544 (1980).

9/ *Id.* at 565-66 (internal quotations and citations omitted; emphasis supplied); *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (generally speaking, primary jurisdiction over land that is Indian country rests with the federal government and the tribe and not with the states) (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)); *but see Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) (tribe's inherent, retained sovereignty is not exclusive but reaches only that power needed to control internal relations, preserve the tribe's unique customs and social order, and prescribe and enforce rules of conduct for its own members).

10/ *But see* supra, note 3.

Under this paradigm, states would almost always lack jurisdiction over non-Indian carriers providing service targeted solely to Indians and Indian businesses on reservations, and under many factual circumstances states will also lack jurisdiction over such carriers' providing service targeted to all residents and businesses on reservations. The basis of this approach is that tribal governments, not states, possess jurisdiction in cases affecting needs vital to the tribe's political and economic development and the overall well-being of the residents of the reservation. In factual circumstances where this is the case – such as universal service offerings targeted to reservation residents – the states would lack jurisdiction, and therefore the FCC would have jurisdiction under Section 214(e)(6), to designate ETCs. Such a finding would be particularly appropriate given that "it is reasonable for [an agency] to adopt an interpretation of its regulations requiring, when lands are in dispute, presumptions in favor of Indian country status and resulting federal jurisdiction." 11/

Indeed, the FCC has already recognized that "telephone service is a necessity in our modern society." 12/ The Commission has also stated that "lack of access to basic telecommunications services puts [ ] Indian communities at a tremendous disadvantage," and offers the following reasons for this conclusion:

(1) As public officials rely more on telephone opinion polls to assess public sentiment and set policies, citizens who cannot be called are often not heard, and their views may be ignored.

(2) Communities without phone lines lack access to the Internet, which is quickly becoming one of the most important media that people use not only for communication, but also to retrieve valuable educational, medical, political and financial information.

(3) Unemployed workers seeking jobs cannot give prospective employers telephone numbers at which to reach them, nor can they make follow-up calls quickly and easily.

11/ *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000).

12/ *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, Notice of Proposed Rulemaking, 14 FCC Rcd 13,679 at ¶ 2 (1999).

(4) People with serious health problems are subject to significant medical risks if they lack easy access to telephone service. 13/

These findings of fact – by the expert federal agency on telecommunications – should be accorded significant deference under the intensive fact- and context-specific inquiry called for by *White Mountain Apache* and its progeny.

These factors fit directly into the *Montana v. United States* paradigm. The first two reasons provided by the FCC appear to materially implicate tribal political integrity. The middle two are significant factors in tribal economic security. 14/ And the second and fourth clearly embrace issues of tribal health and welfare. These factors provide a strong basis for arguing that, under *Montana v. United States*, state commissions lack jurisdiction over non-tribally-owned telecommunications entities providing federally-supported universal service on tribal lands. This is particularly true given that the FCC's universal service program is established under *federal* law involving the allocation of *federal* funds by an agency of the *federal* government, which has a special trust relationship with *federally* recognized Indian tribes. 15/

Moreover, even if some ETCs serving a given reservation already have been designated by the state commission, the FCC may still grant ETC status to other carriers targeting service to that reservation. This would be particularly

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13/ *Id.* The Commission made observations similar to these in the universal service proceeding aimed at improving tribal telecommunications service penetration rates via that federal program. *See Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177 (1999) ("*Tribal Areas FNPRM*").

14/ It is widely accepted that rampant unemployment is one of the most significant impediments to economic security among Native Americans, and the record already established in response to the *Tribal Areas FNPRM* supports this view.

15/ *See HRI v. EPA*, 198 at 1244 (noting the "trust relationship and its application to all federal agencies that may deal with Indians") (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935) (other citations omitted)); *see also id.* at 1246-47 ("The trust duty is . . . most relevant . . . when an agency decision necessarily incorporates a determination as to whether certain lands are within the scope of tribal territorial sovereignty.") (citing *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941)).

appropriate where an existing ETC is providing service on a widespread basis that only incidentally covers the reservation, such an RBOC serving the whole, or most of, one or more states, in which case the service presents factual circumstances far different from a carrier targeting service to a reservation. In addition, even where an existing state-designated ETC's service area consists solely or largely of a reservation, the FCC can still grant ETC status to carriers proposing to provide targeted universal service to the reservation under Section 214(e). 16/

To be sure, some cases suggest that states, rather than tribes, have authority over telecommunications or other utility services provided on reservations by non-Indians, 17/ but these cases can be distinguished on their facts from the situation at issue here. First, the service provided by U S WEST in the *Cheyenne River* case was part of a larger, state-wide (indeed, multi-state) offering which only incidentally covered the subject reservation. When service is directed solely or largely to the reservation, however, as would be the case for a company seeking an ETC designation under 214(e)(6), the balance of the equities is substantially different, and the fact- and context-specific inquiry called for by *White Mountain Apache* would be extremely different. Second, neither case involved service being provided under a program administered and funded by the tribe's partner in its trust relationship, *i.e.*, the federal government. Again, this important fact would

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16/ *See, e.g., Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 974 (10th Cir. 1987) ("[T]he past failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek nation or negate Congress's intent to protect Creek tribal lands and Creek governance with respect to those lands.") (cited in *HRI v. EPA*, 198 F.3d at 1246 (noting that "Congress's intent to protect tribal lands and governance extends no less to EPA than to *other departments of the federal government*") (emphasis supplied)).

17/ *Cheyenne River Sioux Tribe Telephone Authority v. Public Utility Commission*, 595 N.W.2d 604 (SD 1999) (upholding state PUC's refusal to approve the sale of three U S West telephone exchanges in South Dakota to a wholly owned subsidiary of the tribal government, based on PUC's finding that it would lose its jurisdiction to regulate the three exchanges in the public interest once ownership passed to the tribe); *Devil's Lake Sioux Indian Tribe v. North Dakota PSC*, 896 F.Supp. 955 (D. ND 1995) (rejecting tribal regulatory authority's efforts to authorize a provider of electric service in derogation of a monopoly granted to another service provider by the PSC, because the provision of electrical service did not trigger sufficient political, economic, health, safety or welfare concerns to accord wholesale tribal jurisdiction over the provision of electricity on the reservation).

require rebalancing the "particularized inquiry" necessary for determining whether state commissions are sufficiently divested of regulatory jurisdiction over the provision of universal service on tribal lands. Finally, in neither case had a federal agency made factual findings comparable to those that the FCC has made in the universal service proceeding regarding the critical importance of the service at issue to the political and economic well-being and health and welfare of the members of the tribe.

The bottom line is that the FCC has ample legal authority to designate ETCs in factual circumstances where carriers propose universal service offerings targeted to residents of reservations, even in cases where a state or its commission may claim jurisdiction, 18/ and the Commission should therefore adopt rules clarifying the situations in which it will do so.

18/ *See HRI, Inc. v. EPA*, 198 F.3d at 1244 ("because EPA, as an agency of the federal government, has an independent duty to protect Indian interests, we conclude that the agency did not err in finding, despite [ ] state adjudications [finding state jurisdiction], a legitimate dispute as to the jurisdictional status of the lands in question").